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**Supreme Court of the United States,**

**OCTOBER TERM, 1940.**

**No. 47.**

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,
*Petitioners,*
*against*
F. W. WOOLWORTH CO.

# BRIEF FOR RESPONDENT.

Certiorari by this Court to the Supreme Court of Wisconsin was granted on the 20th of May, 1940 (R. 79) to review a judgment of reversal by which the Supreme Court of Wisconsin set aside a tax assessment and held that the Wisconsin Privilege Dividend Tax Act was invalid as to foreign corporations.*

## The Opinions of the Court Below.

The opinion of the Court below is printed at page 78 of the Record and is reported in 233 Wis. 305.

The opinion to which it refers for the reasons of reversal —*J. C. Penney Co.* v. *Wisconsin Tax Commission*,—is reported in 233 Wis. 286.

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* *Italics, unless otherwise stated, ours.*

## Jurisdiction.

Petitioners invoked jurisdiction under Section 237b of the Federal Judicial Code and under Rule 38 of the Rules of this Court, and asserted that solely a question of law and purely a federal question were involved.

Respondent in opposition urged that the Court below had recited in its opinion that respondent had invoked violation of the State Constitution as well as of the Federal Constitution, and argued that the non-federal ground was sufficient to sustain the reversal.

When the citizen raises as against a state in a state court the claims that a state statute violates rights under both the State and Federal constitutions and the court holds that the statute is unconstitutional, it has presumably held that the statute violates its state constitution even although in reaching its conclusion it followed a federal case.

In *Minnesota* v. *National Tea Co.*, 309 U. S. 551 where a somewhat similar situation was presented (violation of State and Federal Constitutions being claimed and the State Court influenced to its conclusion by a federal case) this court departed from its usual practice, and remanded the cause to the Supreme Court of Minnesota for clarification in respect of this court's jurisdiction. The Supreme Court of Minnesota then in an opinion filed 27 September 1940 stated:

> "Counsel for the state in oral argument and brief have urged that we write our present 'decision in those cases on such a basis that the Supreme Court of the United States will have unquestioned jurisdiction to review' it. We think so to do would be both unwise and improper. Judicial duty does not permit us to shift or avoid the responsibility resting upon us to exercise our own honest judgment in the 'interpretation of our own constitution' with finality."

Had the court below in the case at bar not passed upon the question primarily before it either alone or in connection with the similar federal question, it would have been easy for the attorney general to have obtained its certificate to that effect.

In accordance with long established doctrine this Court is without jurisdiction.

*Leathe* v. *Thomas*, 207 U. S. 93;
*Lynch* v. *New York, ex rel. Pierson*, 293 U. S. 52.

## The Statute.

Section 3, Chapter 505, Laws of Wisconsin, 1935, as Amended by Chapter 552, Laws of Wisconsin, 1935, provides:

> "Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.
>
> (2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.
>
> (3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.
>
> (4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and

property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section, dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

## Statement of Case.

It was stipulated by the parties that F. W. Woolworth Co. is a New York corporation conducting a retail mercantile business in 29 states of the United States (including Wisconsin, the District of Columbia, and Cuba), and through subsidiaries, in the remaining 19 states of the United States, and in Canada, Great Britain and Germany. The statutory principal office of the Company, at which stockholders' meetings are held, is in New York, and the principal business office at which meetings of Directors are held is in New York (R. 44). It is also stipulated:

> "That all meetings of the Board of Directors of the Company at which dividends are declared are held in the State of New York; that all acts of the Company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York, and that the funds out of which such dividends are paid are kept in the State of New York" (R. 44).

At the time of the declaration of the first dividend involved herein F. W. Woolworth Co. had total shares issued (except treasury) of 9,703,613. Its total stockholders were 50,180. The total dividends paid (except on treasury shares) were $5,822,167.80. The number of Wisconsin shareholders was 457. The total shares held by Wisconsin residents were 14,597. The dividends paid to Wisconsin residents were $8,758.20. The percent of dividends paid to Wisconsin residents was .1504% (Exhibit 10, fifth tabulation, printed opposite page 66 of Record).

In respect of the method of declaring dividends, the Record shows:

> "• • • With respect to the method and procedure used in the paying of dividends, the dividends are declared by the Board of Directors at meetings held

at 233 Broadway, New York, and paid by our transfer agents, City Bank Farmers Trust Company, 22 William Street, New York. The checks are written by that transfer agent and we issue one check to the transfer agent for the total amount of dividends payable. That transfer agent is a bank in New York City. The dividends are then transmitted to the stockholders by placing the same in the mail in New York City. Our board of directors adopts a form of resolution at the time of declaring the dividend. No act regarding the declaring or paying or transmitting of the dividend is performed within the State of Wisconsin, and there was no such act performed during any of the years 1935, 1936 or 1937" (R. 34).

The Record further shows:

" • • • None of the meetings of the Board of Directors of the company have ever been held in the State of Wisconsin. No meetings of stockholders have ever been held in the State of Wisconsin. Stockholders' meetings are held at Watertown, New York. In the payment of dividends we do not make any attempt to earmark any particular source of the money from which the dividends are paid or any particular period during which the moneys were produced which were used for payment of dividends. The dividends are paid out of the general funds of the company" (R. 36).

In respect of the method of business, the Record shows:

" • • • We have stores operating in Wisconsin and in all of the other states of the Union. The gross receipts from sales from the stores in Wisconsin are handled in the following manner: after the money gets into the till of the local store from gross receipts from sales the local manager pays local bills such as salaries and small supplies that he needs in the store. He deposits the balance above those requirements in a local bank. That bank maintains the money and periodically our Minneapolis office draws on the bank account. The manager has no jurisdiction over the

money after it is placed in the bank account and has nothing to do with the transmittal of the money from the local bank. No one in Wisconsin has anything to do with the withdrawal of that money from any Wisconsin bank. This surplus money in the Wisconsin bank is taken to the Minneapolis office where it is combined with money received from banks in various other states under the jurisdiction of the Minneapolis office. No attempt is made to keep the money separate from the different states. The Minneapolis office uses this money in the payment of merchandise bills, alteration, improvements, accounts or any other expenditures that they have. From time to time the Minneapolis office accumulates sufficient funds above their requirements, and those are transmitted to the main office in New York, placed in the bank account in New York, from which bank account money is from time to time transferred to the City Bank Farmers Trust Company, from which the dividends are paid. The general corporation expenses are paid out of the funds in New York under the direction of officers who have their offices in New York City and who perform their duties in New York City" (R. 34-36).

The Minneapolis office takes in Minnesota, part of North Dakota, Iowa, part of Nebraska, part of Michigan, and Wisconsin. There is a staff of about 100 at the Minneapolis office, supervising approximately 150 stores (R. 39).

## Summary of Argument.

(1) The Act as imposing a tax on the privilege of declaring in New York dividends by a New York corporation has properly been held unconstitutional.

(2) The Act as imposing a tax upon the privilege of a nonresident stockholder to receive, outside Wisconsin, dividends declared in New York by a New York corporation, has properly been held unconstitutional.

(3) Wisconsin did not get jurisdiction to tax foreign declared and paid dividends on any constructive situs within Wisconsin of the dividend itself or of the transaction of declaring or receiving the dividend outside of Wisconsin, and the Court below properly so held.

(4) Petitioners' brief presents no theory under which the Act can be sustained and shows no error in the decision below.

(5) To sustain the Act as imposing a tax on such part of the dividend as Wisconsin law decrees contains Wisconsin earnings would deny full faith and credit to the laws of New York in respect of dividends.

## ARGUMENT.

### POINT I.

**The Act as imposing a tax on the privilege of declaring in New York dividends by a New York corporation has properly been held unconstitutional.**

This statute in its clearly expressed and inseparable features assumes jurisdiction:

(1) over the privilege of declaring, outside Wisconsin, a dividend by a foreign corporation;

(2) over the privilege of receiving, outside Wisconsin, a dividend by a nonresident stockholder;

(3) over the dividend declared to foreign stockholders, for the tax is to be deducted from it;

(4) over the foreign payor corporation in respect of the dividend, for it is directed to deduct it from the dividend;

(5) in respect of the constituent parts or sources of the foreign dividend, for it decrees that the dividend is divisible

and in part contains income derived from Wisconsin property.

The stipulation between the parties herein is that all the acts of the Corporation or of its agents in connection with the declaration and payment of its dividends are performed within and pursuant to the laws of the State of New York; and that the funds out of which the dividends are paid are located in New York (R. 44). And the detailed testimony, concerning which there is no dispute, re-enforces these summary facts that the dividend as to source, legal and financial, is exterior to Wisconsin.

In *State ex rel. Froedtert G. & M. Co.* v. *Tax Commission*, 221 Wis. 225, the Court at page 242 said:

> "Of course it does not follow that the State may impose the instant tax in case of a foreign corporation because it may impose it in case of a domestic corporation. The declaring of a dividend by the foreign corporation and the transmittal of it would be done without the taxing state and neither would be a transaction within it, nor would the funds out of which the dividend was paid be located within the taxing state at the time of the payment."

In *J. C. Penney Co.* v. *Tax Commission*, 233 Wis. 286, the Court at page 289 said:

> "No act in connection with the payment of dividends was performed within the State of Wisconsin, and no act in connection with the receipt of such dividend was performed in the state of Wisconsin, except that certain stockholders of the Company received their mail in this state."

The Court at page 291 stated that it had previously, in the *Froedtert* case, held that the Act "imposed an excise tax upon the transaction involved of transferring the dividends from the Corporation to its stockholders". It held at page 292 that on the basis of an excise tax it cannot be imposed

"upon the dividends declared by a foreign corporation because they are not declared within this State, nor is the privilege one granted by this State". The Court at page 297 concluded:

> "We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin."

The Court below was led to this conclusion by the recent decision of this Court in *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, and after reviewing such case, at page 296 stated:

> "In our view the California case" (i. e. Connecticut General *v.* Johnson) "is a stronger case for jurisdiction to tax by a state than is the present case * * *."

In *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, the appellant was a Connecticut corporation admitted to do an insurance business in California. In addition to its business conducted within that State, it had entered into contracts with other insurance corporations likewise licensed to do business in California, re-insuring them against loss on policies of life insurance effected by them in California and issued to residents there. These re-insurance contracts were entered into in Connecticut, where the premiums were paid and where the losses, if any, were payable.

This Court held that California did not have jurisdiction to tax the re-insurance in Connecticut of California risks, at page 80 saying:

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it."

In *McCulloch* v. *Maryland*, 4 Wheat 316, 429, the Court said:

> "All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation."

It is well recognized that to sustain a privilege tax the privilege must be enjoyed in the state imposing it. *Provident Savings Society* v. *Kentucky*, 239 U. S. 103.

Petitioners herein at p. 48 of their brief state:

> "It is perfectly evident that the State of Wisconsin may not, as an independent basis of taxation, tax the exercise of a privilege which it does not grant. Neither may it, as an independent basis of taxation, impose a tax upon a transaction which occurs without its territorial jurisdiction."

The petitioners, also on page 48 of their brief, state that they do not disagree with the "first" proposition of the Court below which on page 47 they set forth as follows:

> "(1) The exercise by a foreign corporation without the state of the power to declare and pay a dividend is not in itself taxable by the State of Wisconsin, since
>
> (a) The privilege to declare the dividend is not granted by the State of Wisconsin, and,
>
> (b) The physical acts of declaring and paying the dividend do not occur within the territorial limits of Wisconsin."

The petitioners also state as a part of their point heading on page 47:

> "The declaration and payment of dividends outside the State of Wisconsin by a foreign corporation does not itself constitute an event taxable by Wisconsin *and the court below properly so held.*"

The due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.

*Conn. General Co.* v. *Johnson*, 303 U. S. 77, and cases cited at page 81.

The determination of the court below as to the incidence of the tax, follows logically the language of the act and is here controlling.

*Colorado Bank* v. *Bedford*, 310 U. S. 41, 52.

## POINT II.

**The Act as imposing a tax upon the privilege of a nonresident stockholder to receive, outside of Wisconsin, dividends declared in New York by a New York corporation, has properly been held unconstitutional.**

There is no ambiguity in the Act, and no construction can be involved to eliminate its essential feature, which is to deduct a tax from a dividend for the privilege of receiving it. The act constitutes a novel and extreme attempt to reach beyond state boundaries for taxpayers. The tax allocable to dividends received by Wisconsin residents amounts to less than five dollars per dividend (R. 10, 11). The tax amounts to about $2700 on dividends of about $5,800,000 paid on 9,750,000 shares to over 50,000 stockholders. (Tables A and C printed opposite p. 66 of Record.) It thus runs into impossible fractions of a cent per share. F. W. Woolworth Co. at no time deducted any of the taxes from the dividend paid its stockholders (R. 10) and the Tax Commission took the position that when the corporation pays the tax and does not withhold it from dividends there is in effect an additional dividend to the stockholders equal to the amount of such tax (R. Table B, opposite page 66).

In *State ex rel. Froedtert G. & M. Co.* v. *Tax Commission*, 221 Wis. 225, the Court recognized the unconstitutional feature of the Act as imposing a tax on the privilege of the nonresident stockholder of receiving the dividend, and it seems to us, struggled to eliminate it from the statute. It said at page 232:

> "It is contended that the language imposes a tax upon the recipient of the dividend. The language is perhaps susceptible to the construction that the legislature so considered it. * * * However, the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders."

The Court stated at page 234 that the Act was claimed unconstitutional as to nonresident stockholders "as an attempt to tax nonresidents over whom the State has no jurisdiction", and at page 235 said:

> "If the tax were considered as a property tax, or as a tax imposed on the nonresident, this would be correct. But the tax is an excise tax, a tax on the transaction involved."

On the motion for rehearing, the Court at page 243 said:

> "The brief on motion for rehearing assumes that we have held the tax imposed by statute to be against the corporation. We did not in the original opinion take the position that the tax is necessarily one against the corporation. * * * If the tax is an excise tax, and we hold that it is, it is entirely immaterial upon whom the burden of it ultimately falls."

In *J. C. Penney Co.* v. *Tax Commission*, 233 Wis. 286, the Court at page 295 stated that in the *Froedtert* case it had rejected the contention that the tax was a tax on property.

The essential feature of the Act, as a tax on the foreign stockholder or upon the privilege of the foreign stockholder

to receive a foreign dividend, with the payor corporation constituted the collection agent outside Wisconsin in violation of its New York contract with stockholders, cannot be defended.

In *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 153 U. S. 628, the railroad company was organized under the laws of the State of New York. Part of its road was in Pennsylvania. Pennsylvania assessed a tax upon its bonds owned by Pennsylvania citizens, and required its treasurer in New York when making payment of interest on the bonds to deduct and pay the tax into the Pennsylvania state treasury. This Court at page 645 said:

> " * * * It assumes to do what the State has no authority to do, to compel a foreign corporation to act, *in the State of its creation*, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania. Under the sanction of the laws of New York, the defendant corporation executed prior to the passage of the act of 1885 bonds, with interest coupons attached, payable in that State and not elsewhere. It gave mortgages to secure the payment of those bonds and coupons, according to their tenor. Neither the bonds, nor the coupons, nor the mortgages, contain anything that would, in law, justify the company in refusing to meet its obligations, according to their terms and without deduction on account of taxes due from the holders of such bonds or coupons residing in another State." (Italics the court's.)

See also *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 435.

In the case at bar Wisconsin is attempting to compel a foreign corporation in New York, the state of its incorporation, to collect a tax on a debt which it owes another nonresident, in the impairment of its New York obligation and in violation of its New York contract with its stockholders.

No attempt is made in the Attorney General's brief to uphold the constitutionality of this statute in this, its

essential feature, and it is admitted that the payment of dividends ouside the State of Wisconsin by a foreign corporation does not constitute an event taxable by Wisconsin (Petitioners' Brief, pp. 47, 48). And it seems to be admitted at page 56 of Petitioners' brief that the State of Wisconsin may not impose a tax upon the recipient of a dividend where such recipient is a nonresident.

But these obviously (and seemingly admittedly) unconstitutional features condition and characterize the entire Act and constitute its enforcement machinery. They cannot be eliminated and leave any part of the Act operative against the foreign corporation. The act of payment of a dividend is entire and indivisible. That act and every element in it is admittedly beyond the jurisdiction of Wisconsin.

It may be a simple matter for the Legislature of Wisconsin to revise the Act so that it becomes another income tax act against the corporation, but it transcends, we respectfully submit, the proper function of this Court to do so or to suggest that the Court below should have done so. Yet it seems to us that the petitioners' brief is mainly directed, after an abandonment of the essential features of the Act, to an attempt to obtain from this court a revision of the statute into an income tax act imposed upon the corporation.

It is not thus allowable to ignore the avowed purpose and operation of the plain terms of the act.

*United States* v. *Butler*, 297 U. S. 1, 58;
*Liggett Co.* v. *Lee*, 288 U. S. 517, 535;
*Matson Navigation Co.* v. *United States*, 284 U. S. 352.

## POINT III.

**Wisconsin did not get jurisdiction to tax foreign declared and paid dividends on any constructive situs within Wisconsin of the dividend itself or of the transaction of declaring or receiving the dividend outside of Wisconsin, and the Court below properly so held.**

Petitioners admit that inasmuch as the privilege is not granted by Wisconsin, its exercise is not in itself taxable by Wisconsin and that the Court below properly so held (Pet. brief, pp. 47, 48). Petitioners thus have a heavy burden to show that the Court below, after properly holding that the privilege was beyond taxing jurisdiction on well recognized grounds, erred in not at the same time holding that the privilege was within taxing jurisdiction on other better recognized or more dominant considerations. Any method of attempting to bring the Act back within jurisdiction must be fictional. Legal fictions are impossible of application to a privilege actually exercised beyond Wisconsin boundaries. No court which has admittedly properly held that it is exercised outside Wisconsin can be charged with error in not adopting a contradicting fiction. No fiction can protect the privilege from impairment and confusion and respondent's rights from violation. No fiction can pretend that a privilege admittedly exercised in and granted by New York has its fractional exercise in 47 other states of the Union.

The only fiction ever suggested herein has been properly resolved against petitioners.

In *State ex rel. Froedtert G. & M. Co.* v. *Tax Commission*, 221 Wis. 225, the action was for a declaratory judgment, brought in the first instance in the Supreme Court of Wisconsin. It was brought by a domestic corporation. The Court, in its original opinion, upheld the Act in respect of

domestic corporations, but made a number of strong suggestions that the Act was unconstitutional in respect of foreign corporations. On motion for rehearing the Court repeated the doubts it had expressed in regard to the constitutionality of the tax as a privilege tax on foreign corporations, at page 242 saying:

> " • • • Of course, it does not follow that the state may impose the instant tax in case of a foreign corporation because it may impose it in case of a domestic corporation. The declaring of a dividend by the foreign corporation and the transmittal of it would be done without the taxing state, and neither would be a transaction within it, nor would the funds out of which the dividend was paid be located within the taxing state at the time of the payment."

At pages 242 and 243 it suggested that there was a question of whether "the dividends involved in the instant transfer tax, which have been earned within the state, have not such a constructive situs within this state as to render them subject to the tax imposed by the instant statute."

The Court suggested that the domestic corporation could not raise questions as to elements of unconstitutionality which did not affect it. It also suggested that there were no facts in the Record in regard to such questions, and that it could not consider facts stated in an *amicus curiae* brief submitted by a foreign corporation. It, however, did suggest, as to dividends of foreign corporations, at page 245:

> "The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state."

In the case at bar, the rights of a foreign corporation under the statute were directly involved and were presented to the Court below on an ample factual record. It was stipulated that all acts of the Company or its agents in connection with the declaration and payment of the dividends are

performed within and pursuant to the laws of the State of New York and "that the funds out of which such dividends are paid are kept in the State of New York" (R. 44).

The detailed facts are not in dispute (Petitioners' Brief, pp. 6, 8), and amply support the stipulation of the Wisconsin Tax Commission that the funds out of which the dividends are paid are New York funds.

In *J. C. Penney Co.* v. *Tax Commission*, 233 Wis. 286, the second headnote reads:

> "The fact that a fund which became the subject of a transaction in one State was earned in another State and might have been taxed there does not give such transaction a situs within the other State for the purpose of taxation."

The Court at page 293 referred to its prior decision in the *Froedtert* case, and stated that to meet an objection as to the constitutionality of the Act the Court had, on rehearing, held that the dividend "declared by a foreign corporation was taxable to the extent that it was allocable to business transacted or property situated in this State because the dividend involved the distribution of earnings made within the state and such earnings had a constructive situs within the state." It stated at page 295 that in the *Froedtert* case it had "rested the right of Wisconsin to tax the dividend in question on the ground that that part of the dividend taxed having been earned within the state, the transaction of declaring and receiving the dividend had a situs within the state although the transaction took place in another state".

The Court then determined against constructive situs, at page 297 saying:

> "The question here involved is one of the incidence of taxation and not whether the state has jurisdiction of certain corporate activities by reason of a business situs of a corporation. *No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based.*"

The petitioners state at page 6 of their brief that the detailed facts are not in dispute and that "no issue as to the facts was raised or is presented in the cases in the state courts of Wisconsin and none now exists or is presented." The testimony in the Record and the stipulation of the Wisconsin Tax Commission that all of the acts of the Company or its agent in connection with the declaration and payment of the dividends are performed within and pursuant to the laws of the State of New York, and its stipulation that the funds out of which dividends are paid are kept in the State of New York (R. 44) quite justified the Court below in its conclusion that no contention was made or could be made of any business situs of the corporation in Wisconsin justifying the tax on the dividends or the privilege of declaring or receiving them.

It would be absurd, moreover, to give dividends constructive situs in 47 different States.

The dividend is an intangible existing as a relationship between corporation and stockholder by virtue of the New York contract, and made effective through New York control and New York protection.

See *Curry* v. *McCanless*, 307 U. S. 357, 365, 366.

In *Newark Fire Ins. Co. v. State Board of Tax Appeals*, 307 U. S. 313, in the opinion of Mr. Justice Reed it was stated that there was a presumption that the intangibles of a corporation be taxed solely at the State of its domicil; that where consideration has been given to the existence of a business situs of intangibles for taxation by a State other than the State of domicil, "there has been definite evidence that the intangibles were an integral part of the business conducted." And a practical rule in the matter was stated —"To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity."

The decision of the Court below is also in accordance with the previous Wisconsin decisions on this subject of no business situs acquired in Wisconsin for the purpose of taxing corporate intangibles.

*Newport Co.* v. *Wisconsin Tax Commission*, 219 Wis. 293, 306 (cert. denied 297 U. S. 720);
*Tyler* v. *Dane County, Wis.*, 289 F. 843, (approved in *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. [illegible], 81, 83);
*Estate of Shepard*, 184 Wis. 88;
*Stone* v. *Wisconsin Tax Commission*, 197 Wis. 71, 74.

This determination is a factual determination. No other conclusion can be reached in respect of the facts of this Record, particularly in view of the stipulation of the parties. The factual determination is in respect also of the local law, and should be accepted by this Court.

*Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292;
*Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365;
*Kryger* v. *Wilson*, 242 U. S. 171, 176.

As we read petitioners' brief no claim is made that the court below erroneously determined on the facts of the record that there was no constructive situs to justify the tax.

## POINT IV.

**Petitioners' brief presents no theory under which the act can be sustained and shows no error in the decision below.**

We cannot agree with petitioners' analysis of the case of *State ex rel. Froedtert G. & M. Co. Inc.* v. *Tax Commission*, 221 Wis. 225, made throughout their brief and more particularly at pages 24-26, and 30 thereof.

The Court therein in respect of the statute's application to foreign corporations made a number of suggestions of invalidity but made only one suggestion of validity, viz.--that the foreign declared dividend might have a constructive situs within Wisconsin. It argued by analogy to inheritance or estate taxes in respect of the application of the statute to domestic corporations, where the devolution of property by virtue of the declaration of the dividend would, it argued, be within Wisconsin. At page 242 it recognized that such an analogy would be inappropriate to the application of the statute to dividends declared outside Wisconsin by a foreign corporation, because declaration, transmittal, payment, the transaction, and the fund would all be outside the taxing state. The only suggestion of possible validity in respect to the statute as to foreign corporations was that of constructive situs of the dividend. Judge Fowler, who wrote the opinion in the *Froedtert* case, in his dissenting opinion herein attempted to sustain the statute solely on the theory of constructive situs.

But the Court below came to the conclusion on an ample factual record that there could be no constructive situs of the dividend or of the acts of declaration or receipt which justified the tax.

Petitioners' brief relies upon analogy to inheritance taxes, discarded by the Court below in respect of application to foreign corporations, but does not assert or claim or argue error in the Court below in its determination that the dividend could have no constructive situs in Wisconsin.

The Court below was obviously of the opinion that the only suggested theory on which the Act could be sustained in respect of foreign declared dividends was that of constructive situs, for, after considering its prior suggestions in respect of constructive situs in the *Froedtert* case, and after considering and quoting from this Court's opinion in *Connecticut General* v. *Johnson*, as holding therein that the transaction in Connecticut did not have a situs within the

State of California for the purpose of taxation, it said (*J. C. Penney Co.* v. *Wisconsin Tax Com.*, 233 Wis. 286, 297):

> "If there is *no situs for taxation purposes* in the one case, there certainly is not in the other. We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin.
>
> *Diligent and able counsel for the state have been unable to suggest any other basis upon which the tax involved in this case can be sustained than that suggested in the Froedtert case.*"

The Court then said:

> "The question here involved is one of the incidence of taxation and not whether the state has jurisdiction of certain corporate activities by reason of a business situs of a corporation. *No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based.*"

The argument is made throughout petitioners' brief that the statute in its application to foreign declared dividends is analogous to inheritance taxes. In all of the cases cited there were jurisdictional contacts which do not exist in the case at bar. In *Curry* v. *McCanless*, 307 U. S. 357 and *Graves* v. *Elliott*, 307 U. S. 383, jurisdiction of one state to tax was based on control over the right of succession by reason of domicile and jurisdiction of the other state was based on the location of property. In *State ex rel. Froedtert G. & M. Co.* v. *Tax Comm.*, 221 Wis. 225, the Court recognized the inapplicability of the analogy to inheritance tax cases, at 242 saying:

> "The declaring of a dividend is as much of a transaction within the state as is the making out of a stock certificate. If the state may impose a tax on the one transaction, it may on the other. Of course, *it does not follow* that the state may impose the instant tax in case of a foreign corporation because it may impose it in case of a domestic corporation.

*The declaring of a dividend by the foreign corporation* and the *transmittal* of it would be done without the taxing state, and *neither* would be a *transaction* within it, nor would the *funds* out of which the dividend was paid be located within the taxing state at the time of the payment."

We realize that the Wisconsin Legislature has decreed that the dividends of all foreign corporations are, as a matter of law, declared out of Wisconsin profits, and petitioners (not attacking the factual determination to the contrary) of necessity must attempt to support this Act solely by reason of such legislative mandate.

If the Wisconsin legislature has decreed such a conclusive presumption that the Court below was without power to determine the question on the stipulated facts, then the statute is lacking in due process.

*Manley* v. *Georgia*, 279 U. S. 1, 6;
*Heiner* v. *Donnan*, 285 U. S. 312, 325.

The contention was raised below (R. 19) and was argued below (Woolworth brief below, p. 20).

The assumption by Wisconsin of jurisdiction to decree the legal content of a New York dividend involves a further violation of respondent's constitutional rights which we discuss in the following point.

## POINT V.

**To sustain the Act as imposing a tax on such part of the dividend as Wisconsin law decrees contains Wisconsin earnings would deny full faith and credit to the laws of New York in respect of dividends.**

Respondent below, in addition to invoking on the record and arguing the violation of, due process clauses, contended that the Act was in violation of State and Federal Constitutions in that it impaired the contract of its stock-

holders with it under its general corporate charter and under the dividend resolutions by which its shareholders received a right to the dividends in question (R. 18). It also contended that the Act was unconstitutional under Article IV, Section I of the Constitution of the United States because it fails to give full faith and credit to the laws of the State of New York and the corporate charter, by-laws and resolutions of F. W. Woolworth Co. drawn pursuant thereto, which give it the right to conduct its business and declare dividends in the State of New York (R. 19).

In its brief below, this respondent argued that the Act was unconstitutional in that it impaired the obligation of the contract between it and its stockholders, and in that the application of the Act to F. W. Woolworth Co. failed to give full faith and credit to the public acts of the State of New York, the state of its incorporation (Woolworth Brief below, pp. 5, 19, 24, 26, 28).

These matters now assume importance because of the main argument of the Attorney General. For he argues (despite the contradicting factual determination in respect of no constructive situs) that Wisconsin may find a basis of taxation in the New York dividend as including a devolution of Wisconsin earnings.

Thus the efforts of petitioners to maintain the Act as a tax on the transfer or devolution of *Wisconsin earnings in the dividend* involve an even more extreme violation of respondent's constitutional rights. *For there are no Wisconsin earnings in the Woolworth dividend save by virtue of the legislative mandate which purports to decree such a dividend content.* And such Wisconsin mandate is directly against the law of the State of New York pursuant to which it is stipulated (R. 44) the dividends are paid.

Under the New York law, the directors may declare dividends out of surplus. The amounts that they leave in the business and the amounts that they separate into divi-

dends rest in their judicially uncontrolled discretion. What may be the territorial source of portions of the surplus or in what period of time it accrued is of no consequence under the New York law and cannot be forced into the directors' discretion. And as soon as the dividend is declared and segregated from surplus, the corporation becomes a trustee for its payment to the stockholders. It is absolutely owing to the stockholders. The corporation has no right, title or interest therein, and the owners of the 9,750,000 shares of stock are creditors of the corporation for the dividend in accordance with the contractual relationships determined by the certificate of incorporation.

New York Stock Corporation Law, Sec. 58;
New York Penal Law, Sec. 664;
*Liebman* v. *Auto Strop Co.*, 241 N. Y. 427, 433;
*Jermain* v. *Lake Shore & Michigan Southern Railway Co.*, 91 N. Y. 483, 492;
*Strout* v. *Cross, Austin & Ireland Lumber Co.*, 283 N. Y. 406, 413;
*Ford* v. *Snook*, 205 App. Div. 194 (affd. 240 N. Y. 624).

The dividend in the case at bar is peculiarly a creature of New York law. It is an intangible existing by virtue of a relationship between corporation and stockholder made effective only through New York control and protection. New York law is the origin of the rights which constitute it.

See *Curry* v. *McCanless*, 307 U. S. 357, 365, 366.

It is argued in petitioners' brief that although Wisconsin may not tax the privilege of declaring the dividend, it may tax the dividend after it is declared by reason of its power to decree that it contains Wisconsin earnings. It is claimed that inasmuch as Wisconsin can tax Wisconsin earnings, it may find them or follow them through New York bank accounts and general surplus into New York dividends. Thus, it is asserted, the dividend is a devolution

from corporation to stockholder of earnings from Wisconsin which, for taxable purposes, occurs within the state (Petitioners' Brief, pp. 46, 47, 50).

The far-reaching effects of such a claim of jurisdiction should be noted. What Wisconsin may do, every other State in the Union may do. We must not only contemplate 48 privilege taxes on each dividend, but we must face 48 different laws as to the legal incidents and contents of each dividend—48 different jurisdictions legislating as to the relationships between corporation and 50,000 stockholders in respect of 9,750,000 shares of stock.

This law of Wisconsin and the laws of New York are here in conflict. New York directs that the dividend be from surplus and paid without deduction under a trustee obligation. Wisconsin directs that the dividend be from Wisconsin earnings, and determines tax deduction by what the corporation does with its property in New York.

A corporation has a right (as a matter of due process under the Fourteenth Amendment) to have preserved from such burdensome confusion its multitudinous contractual relationships with its stockholders. This Court has repeatedly held that the Constitution in its full faith and credit clause enjoins upon all other states the laws of a corporation's domicil in respect of distribution of funds to its stockholders. This, we submit, is a more precise statement of the necessities of due process, as an element of a right to the maintenance of boundaries between state governments under the "bond of the constitution".

In *Royal Arcanum* v. *Green*, 237 U. S. 531, a fraternal beneficiary corporation had been organized under the general laws of Massachusetts. By a vote of the Supreme Council, the amount of dues was increased, and these changes were recognized in a litigation in Massachusetts, to which, however, Green was not a party. In Green's suit, brought in New York, it was decided that as a certificate

holder he had a contract which entitled him to prevent any increase of dues. The corporation contended that a violation of the full faith and credit clauses of the Constitution of the United States resulted from refusing to hold that the rights of the parties were to be determined by the Massachusetts law.

This Court at p. 542 said:

> "* * * The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable and conflicting criteria. In fact their destructive effect has long since been recognized. *Gaines* v. *Supreme Council of the Royal Arcanum*, 140 Fed. Rep. 978; *Royal Arcanum* v. *Brashears*, 89 Maryland 624. And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, *since an assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed.*"

This Court at page 546 said:

> "Coming then to give *full faith and credit to the Massachusetts charter of the corporation and to the laws of that State to determine the powers of the corporation and the rights and duties of its members*, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the Supreme Judicial Court of Massachusetts in the *Reynolds Case.*"

In *Modern Woodmen* v. *Mixer*, 267 U. S. 544, an action was brought in Nebraska by the beneficiary of a certificate issued presumably in South Dakota by a fraternal beneficial society incorporated in Illinois. A by-law of the corporation provided that long continued absence of any member unheard of should not give any right to recover on any benefit certificate until the full expiration of the term of the member's expectancy according to mortality tables. The Supreme Court of Illinois had upheld the validity of such a by-law, but the Supreme Court of Nebraska, disregarding the by-law, affirmed a judgment for the plaintiff. At page 551 this Court said, through Mr. Justice Holmes:

> *The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law,* is elaborated in *Supreme Council of the Royal Arcanum* v. *Green*, 237 U. S. 531, 542. The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation. *We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership rights against the Company that are refused by the law of the domicil.* It does not matter that the member joined in another State. In the above cited case Green became a member of a Massachusetts corporation in New York, and the State Court held on ordinary principles of contract that his rights were governed by New York law. *Green* v. *Royal Arcanum*, 206 N. Y. 591, 597. But the decision was reversed and it was held a failure to give full faith and credit to the Massachusetts charter as construed by the Massachusetts Court that Green was relieved by decree from paying assessments increased by the corporation after his contract was made."

In *Sovereign Camp* v. *Bolin*, 305 U. S. 66, an action had been brought on a fraternal beneficial certificate in Missouri. This Court held that the judgment of the Missouri Court enforcing the certificate denied full faith and credit to the acts, records and judicial proceedings of the State of Nebraska under which the fraternal beneficiary association was organized.

The relative rights and obligations of creditors and stockholders of corporations are so peculiarly within the regulatory power of the state of incorporation that Wisconsin has no interest in respect of dividends which can turn the scale of decision against the governmental interests of New York. No state other than New York can be said to have any public policy thereon (*Converse* v. *Hamilton*, 224 U. S. 243, 260).

The power which Wisconsin has to license F. W. Woolworth Co. to do business within its boundaries and to regulate such business does not extend to regulating the business of F. W. Woolworth Co. outside Wisconsin, which would otherwise be beyond its authority.

*New York Life Ins. Co.* v. *Head*, 234 U. S. 149, 161, 163, 164;
*Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 435.

There is no necessity that the New York laws and statutes to constitute "public acts" be incorporated in a judgment.

*John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178, 183.

The due process clause is a guaranty of a similar effect —that the state will be kept within its jurisdiction so as not to impair or penalize contracts and obligations existing pursuant to the laws of a sister state.

In *Burnet* v. *Brooks*, 288 U. S. 378, this Court at page 401 said:

> "Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in

> each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction."

In *Milwaukee County* v. *White and Co.*, 296 U. S. 268, this Court at page 276 said:

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."

In *Alaska Packers Assn.* v. *Comm'n*, 294 U. S. 532, this Court at p. 540 said:

> "The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction." (Citing cases.) "Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state." (Citing cases.)

## POINT VI.

**In the event this court determines that it has jurisdiction, the judgment below should be affirmed.**

Respectfully submitted,

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